SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4351-15T1

PAUL RESSLER,

Plaintiff-Appellant,

v.

JOHN S. HOYT, III, ESQ., and
HOYT & HOYT, P.C.,

Defendants-Respondents.

Argued March 27, 2017 – Decided April 18, 2017

Before Judges Sabatino, Nugent and Currier.

On appeal from Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-2381-14.

Glenn A. Bergenfield argued the cause for appellant.

Patrick J. Cosgrove argued the cause for respondents (Pillinger Miller Tarallo, LLP, attorneys; Mr. Cosgrove, on the brief).

PER CURIAM

Plaintiff Paul Ressler appeals the trial court's dismissal of his legal malpractice lawsuit against defendants, John S. Hoyt, III, ("Hoyt"), and his law firm, Hoyt & Hoyt, P.C. Plaintiff

claims that Hoyt negligently or otherwise inappropriately represented him in a medical malpractice case. Among other things, plaintiff contends that Hoyt failed to communicate material information to him concerning the full scope of problems that arose with his medical expert. As a consequence of the attorney's alleged errors and the expert's non-cooperation, plaintiff contends he was forced to settle the medical malpractice case for a sum less than he believes his claims were fairly worth.

The motion judge dismissed this legal malpractice case based upon principles of judicial estoppel and preclusion, predicated on plaintiff's declarations of voluntary assent to the terms of the settlement. The judge dismissed this case on that basis, without allowing discovery to be completed and without conducting any evidential hearing.

For the reasons that follow, we vacate the order of dismissal and remand this matter to the trial court for further proceedings.

I.

The record on appeal is limited, as the trial court dismissed the legal malpractice case before any depositions were taken or other significant discovery was completed. Mindful of the persisting factual dispute between the parties, we set forth the following chronology.

In November 2008, plaintiff underwent surgery to address chronic back pain. An orthopedic surgeon performed the procedure, aided by three anesthesiologists. Complications arose during the surgery, causing it to last eleven-and-one-half hours instead of the anticipated five hours. During that entire time in the operating room, plaintiff laid face-down, on his stomach.

Although medical personnel apparently checked on plaintiff's eyes during the surgery, he suffered "complete bilateral visual loss." His blindness persists to the present. He was ultimately diagnosed with posterior ischemic optic neuropathy, a condition in which increased and sustained pressure on a patient's face can result in blindness.

Plaintiff retained Hoyt to represent him in a medical malpractice action, which Hoyt filed against the orthopedic surgeon, the attending anesthesiologists and their professional practice, and the hospital where the back surgery had been performed. To support plaintiff's claims that the anesthesiologists had deviated from the standard of care and, thereby, caused plaintiff's condition, Hoyt retained the services of a medical expert ("the expert"). The expert is a board-certified anesthesiologist who has specialized in neuroanesthetic care for thirty-five years.

The expert issued an initial report in April 2009, following her review of plaintiff's medical files. She concluded in that initial report that plaintiff's blindness "resulted from prolonged surgery in the prone position during which time the blood pressure was too low, excessive blood was lost and replaced with crystalloids causing facial edema and blood sugar levels[1] were uncontrolled." The expert did note that she reserved the right to change her opinion if further information became available.

After receiving additional records, the expert amplified her opinions in a second written report in December 2009. Among other things, she reiterated that plaintiff's blindness was caused by the extended surgery while he was in a prone position, in which the doctors allowed his blood pressure, temperature, and blood sugar levels to fall too low, plaintiff lost too much blood, and he was improperly given crystalloids rather than blood. According to the expert, this manner of treatment fell below what medical standards of anesthetic care in 2008 would have required. The expert updated her report in January 2010, with no major revisions.

In April 2012, the expert sent Hoyt an invoice for $1,500 in overdue fees. At the bottom of that bill, the expert wrote, "If I do not receive payment within 10 days I will assume you no longer

[1] Plaintiff is diabetic, and the expert opined that the medical staff should have monitored his blood sugar levels during surgery.

require my services on this case." She also noted on what appears to be an expense report to Hoyt a comment that stated: "Long overdue. Withdrawn from the case as services no longer required, despite several notices October 7, 2012."[2]

Notwithstanding the expert's note about withdrawal, Hoyt wrote the expert in July 2013 about her appearing at trial. The expert wrote him back on July 14, 2013, complaining that Hoyt had provided her with "neither the month nor the year" of the anticipated trial date. She provided Hoyt with some available dates for that summer, but closed the email by saying "Note that this availability can change at any time, depending on many other factors."

The following day, Hoyt responded to the expert, explaining that the court was responsible for scheduling, but promised to "keep [the expert] advised as things happen." That day, the expert replied to Hoyt with a one-word response: "Settle?" Hoyt wrote back: "Trying as hard as I can."

Hoyt and the expert engaged in further exchanges on July 15, 2013, discussing the merits of a professional publication on the issue of "informed consent" and how a patient could ever give such consent in an emerging field of medicine. The tone of the messages

[2] It is unclear if this memo is an internal document of the expert or something she sent to Hoyt.

was collegial and did not appear at that time to reflect any rift between their approaches to the case. However, it eventually became clear that the expert was unwilling to support a theory of informed consent that Hoyt wished to pursue at trial. At her deposition in the medical case, the expert apparently refused to confine her opinions to an informed consent theory, and instead discussed alleged surgical deviations.[3]

Hoyt updated the expert on the status of the case in an email on September 26, 2013, telling her that the case had settled with respect to the orthopedist and hospital.[4] Hoyt wrote: "The Sept 30 trial has been adjourned because of your unavailability and will be rescheduled for sometime in Feb 2014. . . . Please let me know of dates you may be unavailable in mid-late Feb and in March."

The expert responded to Hoyt that day in an email, advising him that she did not have her schedule handy and was not certain of her 2014 commitments. Notably, she also wrote in the email, "As you are aware I have severe reservations with this case at present. I suggest you find another expert." However, she did

[3] The parties did not include the expert's deposition in the appellate record. Plaintiff's response to Hoyt's summary judgment motion outlines this conflict between the expert and Hoyt.

[4] Plaintiff settled the matter with the orthopedic surgeon and hospital for $250,000 and $50,000, respectively.

not state unequivocally in the email that she would refuse to testify if she were available.

On October 1, 2013, and again on December 10, 2013, Hoyt wrote the expert via certified mail to inform her that the court had set a January 2014 trial date. He requested her presence to testify. Hoyt again wrote the expert an email on December 31, 2013, indicating that there was no settlement with the anesthesiologists and that a trial was set for January 21, 2014.

Meanwhile, as the litigation progressed, Hoyt and plaintiff engaged in their own lawyer-client communications. Although the parties dispute certain key aspects of those communications, certain contents are documented in written correspondence between them in the appendices.

On February 9, 2010, Hoyt sent plaintiff a letter initially indicating that he was "very, very happy" with the expert's report. Hoyt advised plaintiff that the factors of deviation the expert described in her report would be helpful to their case. This letter did not discuss the issue of informed consent.

Several years later into the litigation, plaintiff wrote Hoyt a letter in October 2013 summarizing his thoughts on the case. Plaintiff expressed his frustration with yet another trial adjournment, and that he was "shocked" by the delay in having to await a January 2014 trial date.

Plaintiff told Hoyt he was "deeply concerned about the comments [Hoyt] made about [the expert]. One would assume that when an expert witness agrees to testify one's behalf, being at the trial to argue the case was part of the agreement." Plaintiff characterized the expert's "position" as "unacceptable," and he expressed concerns with how "aggressive" she would be on the witness stand. He also wrote that he did not want to pay a $12,400 balance in fees owed to the expert.

According to plaintiff, Hoyt had told him that the expert was getting pressure from her professional association not to testify as an expert in the case. Plaintiff referred to this in his October 3, 2013 letter to Hoyt, expressing outrage over the situation and suggesting that it be disclosed to the court and opposing counsel.

Hoyt responded to plaintiff in an excerpted email dated October 8, 2013, advising that they could not replace the expert at that juncture because the court would not allow such a late substitution. Hoyt also noted that the January 2014 trial date was the best they could do.

Plaintiff replied to Hoyt in an email on October 9, 2013, stating: "As angry as I am about [the expert] and the trial date I guess I have to live with it. I have to defer to you as my attorney on these . . . matters."

As the trial date approached, Hoyt told plaintiff that the expert was reluctant to testify "because she was receiving pressure" from her professional association but that she provided assurances that she would testify. According to plaintiff's answers to interrogatories in the present action, Hoyt never told him about the disagreement that had erupted with respect to the "informed consent" aspect of the case. Hoyt disputes this allegation.

Hoyt attempted to make several phone calls to the expert on January 14, 2014, leaving her voice messages. He sent the expert, via overnight delivery, a letter on January 16, 2014, requesting her to attend plaintiff's upcoming trial for the following week. The letter noted that Hoyt had "left [the expert] several messages" previously. Hoyt later learned the expert was out of the country and apparently did not receive these messages until after the settlement.

With the trial date looming, Hoyt and plaintiff attended a settlement conference with the trial court on January 17, 2014. That day, plaintiff and Hoyt met in chambers with a trial judge, ex parte, to discuss settlement possibilities.[5] According to

[5] We presume, of course, that the parties and the judge had obtained the consent of defense counsel for the anesthesiologists to permit the ex parte discussion as a means to help resolve the case here. See RPC 3.5(b). There is absolutely no suggestion

plaintiff's interrogatory answers in the present case, Hoyt told him that day the vast majority of medical malpractice trials end with a verdict for defendants. The interrogatory answers also contend that Hoyt informed plaintiff that day of a "possibility" that the expert would not be appearing at trial.[6]

Following that discussion and, presumably, further discussions or negotiations with defense counsel, the parties achieved a $1.5 million settlement to resolve plaintiff's claims against the anesthesiologists.

For reasons that are not entirely clear from the present limited record, plaintiff's assent to the settlement was placed on the record, and, moreover, the judge was asked to provide — and did provide — his "approval" of the settlement terms. The following colloquy on the record occurred at that time, after plaintiff was sworn:

> HOYT: [Y]ou've heard me just recite the terms of the settlement to [the judge]. Is that your understanding, as well?
>
> PLAINTIFF: Yes.
>
> HOYT: And you agreed to the terms of that settlement?

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that the ex parte discussion was improper or unauthorized. The motion judge appropriately noted the ex parte discussion on the record after it occurred.

[6] Again, Hoyt apparently disputes what actually was said.

PLAINTIFF: Yes.

HOYT: Do you understand that in settling this case, this is a full and final conclusion of the matter and that we can never come back another day to seek more money?

PLAINTIFF: Okay.

HOYT: Okay. Do you understand that?

PLAINTIFF: I do understand.

HOYT: Do you understand that by settling this case you're giving up your right to a trial by jury at which the jury could return a verdict in excess of the settlement amount, or below the settlement amount or none at all?

PLAINTIFF: I understand.

HOYT: And based on the terms that we've recited to the Judge, do you want [the] Judge to approve this settlement?

PLAINTIFF: Yes.

HOYT: And you agree to the settlement?

PLAINTIFF: Yes.

HOYT: Have you been happy with my services as your attorney?

PLAINTIFF: It's a loaded question. Yes.

HOYT: I don't have anything further, Judge.

COURT: [Plaintiff], are you the – under the influence of any medicines or alcohol that would impact your ability to understand these terms?

PLAINTIFF: I — that's what I probably need, but no I'm very well-aware.

COURT: Okay.

PLAINTIFF: Of what's going on.

COURT: Do you have any questions for me or your lawyer about the terms of the settlement?

PLAINTIFF: Oh, I don't think really my opinion at this point means anything.

. . . .

COURT: Well, your opinion is very important. It's the most important opinion in here. My question to you is do you have any questions for us about the terms of the settlement?

PLAINTIFF: No.

COURT: Okay. Are you doing this voluntarily?

PLAINTIFF: Yes.

COURT: Okay. You and I have had discussions about this case with your lawyer present, ex parte, and I just want to ask you, have I pressured you in any way to enter this settlement?

PLAINTIFF: No.

COURT: Okay. Has your lawyer pressured you in any way?

PLAINTIFF: No.

COURT: Okay. You're doing it voluntarily?

PLAINTIFF: Yes.

COURT: Okay. All right. Anything else?

HOYT: No, sir.

COURT: Okay.

DEFENSE COUNSEL: NO.

COURT: Very good. All right. [Plaintiff], good luck to you, sir. The Court will approve the terms of this settlement. Okay. Thank you.

HOYT: Thank you, Your Honor.

DEFENSE COUNSEL: Thank you, Judge.

COURT: Okay.

[(Emphasis added).]

The parties in the medical malpractice action memorialized this $1.5 million settlement on January 29, 2014, when plaintiff signed a Release ("the Release"). In addition to releasing the anesthesiologists from liability, the Release stated, in pertinent part, "I hereby acknowledge that by executing this Release and accepting the monies paid hereunder I . . . have received fair, just and adequate compensation for all such claims[.]" (Emphasis added). Even if he discovered new facts post-settlement, the Release specified that plaintiff "waived[d] [his] right to bring a lawsuit against the Releasees" — in this case, the anesthesiologists.

After the settlement was consummated, Hoyt had a series of acrimonious written communications with the expert. We need not

detail those communications here, but suffice it to say that Hoyt criticized the expert for failing to cooperate and be available for trial and, in turn, the expert criticized Hoyt for urging her to support a theory of informed consent that she considered untenable.

Meanwhile, on May 15, 2014, plaintiff wrote the trial judge a letter expressing misgivings about having settled his claims against the anesthesiologists. He alluded to having "serious issues" with the information that his counsel Hoyt had provided him during the process.

Plaintiff then retained his present counsel and filed this legal malpractice action in October 2014, supported by the requisite affidavit of merit. In his complaint, plaintiff alleged that Hoyt had acted negligently by "attempting to coerce the expert into testifying to something other than her opinion, by failing to get an expert who supported their view of the deviations and by failing to insure that the expert witness was available and ready for trial." Further, plaintiff alleged that Hoyt "deliberately misrepresented" to him why the expert was not available to testify.

Hoyt denied all of plaintiff's allegations of negligence and misrepresentation. Among his affirmative defenses, Hoyt asserted res judicata and that plaintiff had waived his cause of action for

legal malpractice. In January 2016, Hoyt moved for dismissal of the complaint, further asserting a related argument of judicial estoppel.

The motion to dismiss, which plaintiff opposed, was heard by a different Law Division judge ("the motion judge") than the one who had presided when the settlement with the anesthesiologists had been placed on the record and who had "approved" the settlement. After hearing oral argument, the motion judge agreed with Hoyt's counsel that plaintiff's present claims are barred by principles of judicial estoppel and preclusion. Accordingly, the motion judge dismissed the complaint with prejudice.

This appeal ensued.

II.

In considering the issues before us, we begin with a recognition of case law addressing how concepts of judicial estoppel might affect a litigant's ability to pursue a legal malpractice action against his or her former attorney after agreeing to settle the underlying action.

As a general matter, judicial estoppel precludes a party from advocating "a position contrary to a position it successfully asserted in the same or a prior proceeding." Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606 (App. Div.

2000), certif. denied, 167 N.J. 88 (2001). The doctrine protects "the integrity of the judicial process." Ibid. It is considered "an 'extraordinary remedy,' which should be invoked only 'when a party's inconsistent behavior will otherwise result in a miscarriage of justice.'" Ali v. Rutgers, 166 N.J. 280, 287-88 (2000) (citing Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996)).

These principles have been applied several times in published cases involving legal malpractice actions that were filed after a client had settled the underlying case.

In Ziegelheim v. Apollo, 128 N.J. 250 (1992), a divorced wife sued her former attorney in malpractice for allegedly providing her inadequate legal advice that led her to take a settlement for less than she should have received. Id. at 257. After the defendant attorney negotiated a divorce settlement, the plaintiff stated on the record that she "understood the agreement, that [she] thought it was fair, and that [she] entered into it voluntarily." Ibid. In the malpractice suit, the plaintiff provided an expert report to the court, which indicated she could have received 50% of her husband's estate and that the defendant attorney should not have counselled her to take a lower amount. Id. at 262. The trial court granted, and this court affirmed,

summary judgment for the defendant, finding she understood the settlement and voluntarily entered into it. Id. at 260.

The Supreme Court in Ziegelheim reversed, holding that a fact-finder could have determined that the defendant attorney had acted negligently based on the expert's report. Id. at 262. The Court specifically rejected a rule advanced in another jurisdiction, which barred recovery in legal malpractice suits unless a plaintiff could demonstrate actual fraud by the attorney. The Court held that, although New Jersey generally favors settlements in litigation, clients nonetheless "rely heavily on the professional advice of counsel when they decide whether to accept or reject offers of settlement, and we insist that the lawyers of our state advise clients with respect to settlements with the same skill, knowledge, and diligence with which they pursue all other legal tasks." Id. at 263. The Court found no reason to apply "a more lenient rule." Id. at 263-64.

Additionally, the Court in Ziegelheim declared that plaintiff's acquiescence to the settlement on the record did not bar her legal malpractice suit under the doctrine of issue preclusion. Id. at 265. "The fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had the party's

incompetent attorney been competent." Ibid. The Court held that the defendant's alleged failure to discover some of the plaintiff's former husband's hidden marital assets may have "led to the improvident acceptance of the settlement[.]" Id. at 266.

Significantly, the Court in Ziegelheim cautioned that it was not intending to "open the door to malpractice suits by any and every dissatisfied party to a settlement." Id. at 267. To prevent unmeritorious claims of malpractice, the Court encouraged litigants to place settlements on the record, and required that "plaintiffs must allege particular facts in support of their claims of attorney incompetence and may not litigate complaints containing mere generalized assertions of malpractice." Ibid. The Court further added this caveat: "The law demands that attorneys handle their cases with knowledge, skill, and diligence, but it does not demand that they be perfect or infallible, and it does not demand that they always secure optimum outcomes for their clients." Ibid. With that balancing of interests in mind, the court reversed the dismissal on summary judgment.

In Newell v. Hudson, 376 N.J. Super. 29 (App. Div. 2005), we held that a divorce client who made "generalized assertions of malpractice" was estopped from pursuing a legal malpractice suit against her former attorney. Id. at 43. There, the attorney had described in detail to the client her proposed alimony settlement,

and advised her that it was unlikely she would receive permanent alimony. Id. at 32. In addition to stating on the record that she voluntarily entered into the settlement agreement, the client accepted the limited duration alimony, noted that if the case went to trial she might receive more or less alimony, that the "agreement was a compromise but was a fair deal," and had discussed the settlement carefully with her attorney "at great length." Ibid. The client later hired a new attorney to seek reconsideration of the alimony settlement, but the Family Part denied the motion. Id. at 33. The client then sued her former attorney in a counterclaim for legal malpractice.

We upheld the dismissal of the malpractice claim in Newell. In doing so, we distinguished the factual setting from the one in Ziegelheim. In Newell, the attorney had adequately negotiated and explained the settlement agreement, whereas in Ziegelheim a "vulnerable litigant" had "unknowingly entered into an inadequate settlement." Id. at 44. We found that the client in Newell had changed her mind, in which case there was no malpractice; at worst, she had lied at the matrimonial proceeding in order to later succeed in a malpractice claim, in which case she was judicially estopped from doing so. Id. at 46-47. We upheld the dismissal of the client's counterclaim because her action was the type of

"self-serving behavior . . . that the doctrine of judicial estoppel is designed to prevent." Id. at 47.

These principles were again examined by the Supreme Court in Puder v. Buechel, 183 N.J. 428 (2005). In that case, the Court held that a matrimonial client who had entered into a divorce settlement was judicially estopped from suing her former attorney for legal malpractice because she had attested when the divorce settlement was placed on the record that the settlement was "acceptable" and "fair." Id. at 437.

Most recently, in Guido v. Duane Morris LLP, 202 N.J. 79 (2010), the Court clarified the appropriate analysis for such cases in a fact pattern outside of the context of a divorce settlement. There, the plaintiff, a corporate officer, sued his former law firm for malpractice, alleging the firm did not adequately disclose to him the stock disadvantages that would come along with a settlement. Id. at 83. Initially, the plaintiff, as the majority shareholder of a corporation, sued the corporation, alleging governance concerns. Ibid. Prior to settlement, the law firm sent the plaintiff a letter advising against any settlement because it could implicate his rights as a shareholder. Id. at 83-84. The court ordered the matter into mediation, where it was eventually dismissed without prejudice. Id. at 84.

A year later, the plaintiff in Guido brought a similar lawsuit against the corporation, and the court again referred the action to mediation. Ibid. The plaintiff ultimately settled, but was not warned again of the voting implications of that settlement. Id. at 85. However, the plaintiff affirmed in court that he understood the terms and did not have any concerns. Ibid.

The plaintiff then brought a malpractice action against his former law firm for failing to warn him about the voting implications. Id. at 85-86. Although the trial court initially granted the law firm summary judgment, it later vacated the decision on reconsideration, instead finding that there was a genuine issue of material fact as to whether the law firm properly informed the plaintiff about the voting impact of the settlement. Id. at 86-87.

In analyzing the facts in Guido, the Supreme Court reemphasized the "bedrock principles" required to be proven in a legal malpractice case. Id. at 92. First, the Court reaffirmed that Ziegelheim still controls how settlement testimony impacts a later legal malpractice claim, reiterating that "the fact that a party received a settlement that was 'fair and equitable' does not mean necessarily that the party's attorney was competent or that the party would not have received a more favorable settlement had

the party's incompetent attorney been competent." Id. at 93 (citing Ziegelheim, supra, 128 N.J. at 265).

In these respects, the Court in Guido limited the scope of Puder:

> When viewed in its proper context — that Puder represents not a new rule, but an equity-based exception to Ziegelheim's general rule — the rule of decision applicable here is clear: unless the malpractice plaintiff is to be equitably estopped from prosecuting his or her malpractice claim, the existence of a prior settlement is not a bar to the prosecution of a legal malpractice claim arising from such settlement.
>
> [Id. at 94 (emphasis added)].

Further, the Court in Guido enumerated two additional considerations that are important in the legal malpractice context:

> Thus, if required to prevent injustice by not permitting a party to repudiate a course of action on which another party has relied to his detriment, our courts will intervene and preclude a party from advancing a claim. In a closely related vein, where a party has prevailed on a litigated point, principles of judicial estoppel demand that such party be bound by its earlier representations.
>
> [Ibid. (citations omitted)].

In affirming the trial court's ultimate ruling in Guido to proceed with the fact-finding, the Court distinguished the case from Puder because the plaintiff in Guido did not testify he was

"satisfied" with the settlement or opine whether it was "fair and adequate." Id. at 95. Rather, the colloquy was about whether the plaintiff "understood" the agreement or was subject to any impediments that would prevent him from understanding it. Ibid. Given the presence of a genuine dispute of material fact, the Court remanded the Guido matter back to the trial court for the resolution of the contested factual issue. Id. at 95.

III.

Applying these principles, we conclude from the limited record that there are abundant and genuine disputed issues of fact that require resolution before principles of judicial estoppel or preclusion are applied here to bar plaintiff from proceeding with his legal malpractice claims.

Among other things, the record is unclear or disputed concerning such issues potentially relevant to an equitable assessment as: (1) what exactly Hoyt advised plaintiff about the actual reason(s) why the expert was not going to testify at the scheduled trial; (2) whether plaintiff was informed about the key disagreement between the expert and Hoyt over the viability of an "informed consent" theory; (3) whether pressure from the expert's professional association was the actual or main reason why the expert was unavailable or reluctant to testify, as Hoyt had

allegedly represented to plaintiff; (4) whether Hoyt informed plaintiff before the settlement was placed on the record or before signing the Release that a consequence of doing so would be to foreclose a future legal malpractice claim; and (5) why the trial court was asked to "approve" the settlement terms, and what plaintiff was told, if anything, about the significance of that approval when the settlement was put before the court.

Mindful that we do not have a complete record and fact-finding at present, it preliminarily appears that the trial court's declaration of "approval" of the medical malpractice settlement may have been gratuitous. This was not a situation under the Rules of Court or statute calling for judicial approval of settlement terms, such as for settlements with a minor or incapacitated plaintiff, see Rule 4:44-3; or a class action settlement, see Rule 4:32-2(e)(1); or the approval of a transfer of structured settlement rights, see Rule 4:44A-1 to -2; N.J.S.A. 2A:16-66. It may well be that the trial court was asked to approve the settlement because of the difficulties that counsel was having with his expert and perhaps his client. We will not speculate on that here, other than to observe that the legal necessity for court approval is not readily apparent from the present record. This is another subject warranting factual development.

Given the existence of these many disputed or unknown facts critical to a fair analysis of the relative equities involved, the matter must be remanded for the completion of discovery and appropriate fact-finding. Cf. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995) (analogously disfavoring dismissal on summary judgment where there are genuine issues of material fact).

Following the completion of discovery, defendants may renew their motion to dismiss the action on the grounds of judicial estoppel and preclusion. Plaintiff may then respond to that motion. The court shall then hold an evidentiary hearing, make appropriate credibility findings, and reconsider whether plaintiff's claims equitably should be dismissed in light of the applicable case law including, most recently, the Court's guidance in Guido. The equitable issues are for the court to decide, and not for a jury. See Sun Coast Merchandise Corp. v. Myron Corp., 393 N.J. Super. 55, 86 (App. Div. 2007) (recognizing that the "ultimate determination of equitable matters is for the judge alone to decide"), certif. denied, 194 N.J. 270 (2008).

In remanding the case, we by no means intimate an appropriate outcome. Nor do we intend on this incomplete record and in the absence of credibility findings to impugn the efforts of plaintiff's former counsel, who collectively achieved $1.8 million

in aggregate recovery for plaintiff in what may have been a difficult and risky liability case. We merely hold that it was premature for the trial court to have dismissed this case in its present posture.

Vacated and remanded. We do not retain jurisdiction.